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No. 89-1904

SUPREME COURT OF THE UNITED STATES

October Term, 1989

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Rafael Hernández Colón, et al.,

Petitioners,

v.

Carlos Morales Feliciano, et al.,

Respondents.

---

On Petition For A Writ of Certiorari To The
United States Court of Appeals For The First Circuit

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**RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

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**RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

## I. Statement of the Case

In an on-going civil rights class action dating back to 1979,[1] which, in turn, had absorbed by consolidation similar cases dating back to 1976,[2] and which continues to be litigated

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1. Feliciano v. Barceló, 497 F. Supp. 14 (D.P.R. 1980). See Morales Feliciano v. Hernández Colón, 672 F. Supp. 627 (D.P.R. 1987); Morales Feliciano v. Hernández Colón, 697 F. Supp. 26 (D.P.R. 1987); Morales Feliciano v. Hernández Colón, 697 F. Supp. 37 (D.P.R. 1988); Morales Feliciano v. Hernández Colón, 704 F. Supp. 16 (D.P.R. 1988); Morales Feliciano v. Parole Bd. of Com. of P.R., 887 F. 2d 1 (1st Cir. 1989), cert. den. 108 L.Ed. 2d 646 (1990).

2. Morales Feliciano v. Romero Barceló, 672 F. Supp. 591 at 593, n. 1 (D.P.R. 1986).

to this day, as recently witnessed by this Court,[3] the United States District Court for the District of Puerto Rico made an award of interim attorneys' fees on September 20, 1988 (the "1988 interim fee award"). Morales Feliciano v. Hernández Colón, 697 F. Supp. 51 (D.P.R. 1988); Pet. Ap. 24a-52a. This 1988 interim fee award was overdue because the District Court had recognized that respondents had long been prevailing parties (Pet. Ap. 31a) and their counsel had been serving without compensation for years and years.

Both sides appealed the 1988 interim fee award to the United States Court of Appeals for the First Circuit. Three appeals were docketed with that court, nos. 89-1193, -4 and -5. No review was sought by writ of prohibition. On May 10, 1989, in an unpublished decision, the Court of Appeals dismissed all of them "for lack of jurisdiction." Pet. Ap. 53a. It ruled that the 1988 interim fee award "is not a final order, appealable under 28 U.S.C. 1291." Id. It also ruled that "the collateral order exception as expressed by Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)" was "unavailing" to support immediate appellate review of the 1988 interim fee award. Pet. Ap. 54a. Thus, "appeals numbered 89-1193, 89-1194 and 89-1195" were "dismissed without prejudice, for the reason

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3. No. 89-1016, Colón, Gov. of Puerto Rico v. Feliciano, 58 U.S.L.W. 3597, 108 L.Ed. 2d 646 (March 19, 1990 order denying petition for writ of certiorari).

that this court lacks jurisdiction to consider them." Pet. Ap. 55a.

Petitioners were apparently satisfied with this result, because they failed to petition this Court as they do now. Petitioners did not see fit to call the attention of this Court to any claim by them to the effect that the Court of Appeals' May 10, 1989 decision (Pet. Ap. 53a-55a) "reformulat[ed] the collateral order doctrine," thus "depart[ing] from this Court's precedents and conflict[ing] with other Court (sic) of Appeals," as they now claim (Pet. 6-13) regarding the Court of Appeals' January 5, 1990 decision (Pet. Ap. 1a-2a). In the 1988 interim fee award, the trial court had refused to grant an enhancement for delay;[4] and also refused to compensate all hours worked at 100% of the applicable "historical hourly rates," using instead reduced historical rates (60% and 80%) for some of the hours worked.[5]

In a January 10, 1989 order, the District Court had left the door open to reconsidering (or iterating) its refusal to grant an enhancement for delay, depending on the decision which this Court might render in what eventually became Missouri v. Jenkins, 491 U.S. ___, 105 L.Ed. 2d 229 (1989).

Indeed, by order of September 13, 1989, the District Court adjusted the 1988 interim fee award pursuant to Missouri v.

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4. 697 F. Supp. at 57-58; Pet. Ap. 35a.

5. Id. at 59; Pet. Ap. 38a-39a.

Jenkins (the "1989 enhancement"). Furthermore, since the 1988 interim fee award only covered work performed up to November 30, 1987, the District Court also made a second interim fee award, covering the period December 1, 1987 to July 31, 1989 (the "1989 interim fee award"); but this one did not contain any compensation for delay in the form of interest. Instead, the rates found to be current in the 1988 interim fee award were applied to this 1987-89 period. Pet. Ap. 4a-23a.

This second time, only petitioners sought review from the United States Court of Appeals for the First Circuit, at first by appeal (no. 89-1997) and, as an afterthought, by petition for writ of prohibition (no. 89-2056). Consistent with its May 10, 1989 disposition of the first round of appeals from the 1988 interim fee award (Pet. Ap. 53a-55a), on January 5, 1990 the Court of Appeals dismissed petitioners' appeal. Once again, the Court of Appeals found that Cohen was unavailing to support petitioners' appeal. "Even assuming that this appeal meets three of Cohen's four criteria, it fails, as it did before, on the ground that no irreparable injury would occur if immediate review were withheld. This factor is the core concern of the Cohen exception.... Indeed, appellants do not even raise this issue in their opposition to the motion to dismiss the appeal." Pet. Ap. 2a (emphasized). The petition for writ of prohibition was denied because it failed to "present the extraordinary circumstances necessary to grant such petition." Pet. Ap. 3a. These January 5, 1990 decisions were likewise not published.

Petitioners were not content with the Court of Appeals' January 1990 decision; but their conduct negated any claim of irreparable injury or extraordinary circumstances to support interlocutory review. Instead of immediately seeking review from this Court, they requested and obtained the longest extension of time possible, adding 60 days to the already generous 90-day period to petition for certiorari.[6] Their petition herein is dated June 4, 1990, the very last day of the extended term and 150 days after the Court of Appeals' January 5, 1990 decision. In the meantime, petitioners have paid into court what, according to them, are all of the amounts owing to respondents under the 1988 and 1989 interim fee awards and the 1989 enhancement. See Appendix hereto. This important fact is not disclosed in the petition for certiorari. In respondents' view, it permeates this whole affair with a strong aroma of mootness.[7]

Petitioners do not seem to understand what, at this stage, cannot be brought before this Court:

A. Whether or not the 1988 interim fee award (Pet. Ap. 24a-52a) was correct;

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6. Pet. 2; see Supreme Court Rules 13.1. and 13.2.

7. United States v. State Tax Commission of Mississippi, 412 U.S. 363 at 368, n. 10, 37 L.Ed. 2d 1 at 7-8, n. 10 (1973). See also Lewis v. Continental Bank Corporation, 494 U.S. ___, 108 L.Ed. 2d 400 (1990).

B. Whether or not the Court of Appeals' May 10, 1989 dismissal of the three appeals from the 1988 interim fee award (Pet. Ap. 53a-55a) was correct; or

C. Whether or not the 1989 enhancement and the 1989 interim fee award (Pet. Ap. 4a-23a) were correct.

The only issue arguably within this Court's jurisdiction, whether or not the Court of Appeals' January 4, 1990 dismissal of petitioners' appeal from the 1989 enhancement, and from the 1989 interim fee award, and its refusal to issue a writ of prohibition, were correct, is not of sufficient import to merit, by itself, review by this Court. In addition to any claim of alleged error, the issue must also merit the exercise of discretion by this Court because of particular circumstances (some of which are described in Supreme Court Rule 10.1.). Stated otherwise, the mere, isolated fact that the Court of Appeals arguably may have "erred" is insufficient to merit rectification of the alleged "error" by this Court. Additionally, there must be an inter-circuit conflict; or defiance by the Court of Appeals of controlling Supreme Court precedent; or a decision of an important question of federal law which has not been, but should be, settled by this Court.

In this particular case, in their first "reason for granting the writ" petitioners claim there is an inter-circuit conflict between the First, Fifth, Seventh and Ninth Circuits on one side and the Second and Sixth Circuits on the other; and in their second "reason for granting the writ," petitioners also

claim there is another conflict, this time between the First and Ninth Circuits. In both "reasons for granting the writ" petitioners claim that the Court of Appeals "depart[ed] from this Court's precedents." There are no inter-circuit conflicts, even superficially; and the Court of Appeals obeyed this Court's controlling precedents.

Respondents note that petitioners' allegation to the effect that the Court of Appeals "depart[ed] from this Court's precedents" is just that, a bald and unsupported claim.[8] Albeit some cases are cited, petitioners fail to explain --- even inartfully --- exactly how was it that the Court of Appeals "departed" from Cohen and its progeny; or exactly how was it that the denial of a writ of prohibition defied controlling precedent from this Court as to the standards for the issuance of such a writ. Thus, both "reasons" asserted by petitioners "for granting the writ" fail the test of Supreme Court Rule 14.5.[9]

## II. Summary of the Argument: Reasons for Denying the Writ

A. This Court recently examined the same (or very similar) issues now presented by petitioners and found them

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8. Or, in petitioners' own language, an "unexplainable and unexplained" claim (Pet. 17).

9. "The failure of a petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be sufficient reason for denying the petition."

unworthy of review. Nothing has changed since then to now make them worthy of review by this Court.

B. There is no real inter-circuit conflict regarding the first issue presented for review, especially considering that the Court of Appeals' decision herein was not published. Instead of "depart[ing] from this Court's precedents," the Court of Appeals' decision was compelled by them.

C. There is no inter-circuit conflict, nor has the Court of Appeals departed from this Court's precedents, as to the second issue presented for review.

D. The final result sought by petitioners defies long-standing policy against piecemeal appeals.

E. The final result sought by petitioners contradicts the policy against extensive, protracted, satellite fee litigation in civil rights cases.

III. Argument

A. The first issue presented for review is whether interim fee awards should be immediately appealable, as a special Cohen exception "in cases of protracted institutional reform litigation with no foreseeable finality" (or whether an enhancement to an interim fee award should be likewise appealable as still another Cohen exception). The second issue is but a subsidiary issue which depends on the first one. If an interim fee award does not qualify for Cohen appellate treatment, an enhancement to an interlocutory, non-appealable interim fee award can hardly qualify as a Cohen exception.

This Court examined the issue of the immediate appealability of interim fee awards (coincidentally, in a civil rights case strikingly similar to this one: a class action over prison conditions, No. 87-1325, Carruthers v. Durán, 56 U.S.L.W. 3654 (1988)). If anything, the similar issue presented in Carruthers was portrayed with more urgency for review by this Court because the fee awards in Carruthers were made post-final-judgment, for monitoring and enforcement of an injunctive decree, and thus it could not be held --- as the Court of Appeals ruled herein --- that the interim fee awards could eventually be reviewed by appeal as of right from the final judgment.

This Court did not find the issue presented in Carruthers worthy of review and thus certiorari was denied on June 6, 1988. 486 U.S. 1046, 100 L.Ed. 2d 627. The petition herein comes two years after that denial, almost to the day. But for that "distinguishing" factor, the basic issue remains the same and the passage of two years has not made the issue any more worthy of review. It remains just as unworthy of review as it was two years ago.[10]

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10. Although not as similar to this case as Carruthers v. Durán, but more recently, in case no. 89-1082, Jones Hirsch Connors & Bull v. U.S. District Court for the District of Puerto Rico, this Court likewise found the issue presented not to be worthy of review and thus the petition for certiorari was denied on April 30, 1990. 58 U.S.L.W. 3690, 3693 (1990). In Jones Hirsch the question presented was whether a district court order imposing sanctions against counsel was final for purposes of immediate appellate review by a federal court of appeals. 58 U.S.L.W. 3532,

B. The alleged inter-circuit conflict which petitioners attempt to construct in their first "reason for granting the writ" exists only in petitioners' imagination.

The Court may readily notice that the First Circuit's ruling herein is perfectly in accord with the views of the Second Circuit, Cullen v. Margiotta, 811 F. 2d 698 at 708 (2d Cir. 1987); the Fifth Circuit, Shipes v. Trinity Industries, Inc., 883 F. 2d 339 (5th Cir. 1989); the Seventh Circuit, Lac Courte Orreilles Chippewa Ind. v. State of Wisconsin, 829 F. 2d 601 (7th Cir. 1987); and the Ninth Circuit, Rosenfeld v. United States, 859 F. 2d 717 (9th Cir. 1988).

The First Circuit's alleged "conflict" with the views of the Second Circuit, as exemplified in Seigal v. Merrick, 619 F.2d 160 at 164 n. 7 (2d Cir. 1980) is only timidly alluded to at page 12 of the petition for certiorari. This is understandable, since the fees in Seigal were not truly interim fees in a case of "protracted institutional reform litigation with no foreseeable finality," as petitioners themselves characterize this case in their first question presented for review. Instead, the fees at issue in Seigal came at the tail-end of the case: at the settlement stage, albeit a settlement that eventually aborted, 619 F.2d at 163, and later the action was finally dismissed, 619 F.2d at 164.

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3690 (1990).

The views of the Second Circuit, which are in perfect agreement with those of the First Circuit herein, are better shown in two cases to which petitioners do not refer: Hastings v. Maine-Endwell Central School District, 676 F.2d 893 (2d Cir. 1982) and Cullen v. Margiotta, 811 F.2d 698 (2d Cir. 1987).

The only other "conflicting" decision to which petitioners point is found in the Sixth Circuit, Webster v. Sowders, 846 F.2d 1032 (6th Cir. 1988), and it too is distinguishable, on its particular facts, from this case. In the paragraph immediately after the one cited by petitioners at page 11 of their petition for certiorari, the Webster court explained its departure from the acknowledged rule that "ordinarily orders awarding interim fees in the course of litigation are not appealable":

> The attorney fee order of Nov. 24, 1986, imposed a prospective burden upon the State to pay large monthly fees without any definite cutoff date, without rulings on central legal issues in the case, without specific findings or conclusions concerning theories of liability and immunity and without assurances that in the event of appellate reversal on the merits the State could recover from plaintiffs' counsel the sizeable amounts already paid (a point conceded at argument by plaintiffs' counsel)....

846 F.2d at 1035.

Unlike Webster, there is no order in the instant case providing for prospective fees[11] regardless of the issues or who is the prevailing party; to the contrary, here the District Court has made so many sufficiently "specific findings or

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11. See District Court opinions cited at pages 1 and 2 of this brief in opposition.

conclusions concerning theories of liability or immunity," that petitioners readily concede (Pet. 8), as the District Court has found (Pet. Ap. 31a), that respondents have been, throughout this litigation, the prevailing parties in this case.

As the Fifth Circuit has explained in Dardar v. Lafourche Realty Co., Inc., 849 F. 2d 955 (1988), the alleged "conflict" among the circuits as to the immediate appealability of interim fee awards is more apparent than real. The different results reached by different circuits in different cases, as to the applicability of the Cohen doctrine in this context, is due to the specific facts of the particular cases or due to a failure to apply all three prongs of the test articulated in Coopers & Lybrand v. Livesay, 437 U.S. 463, 57 L.Ed. 2d 351 (1978).

Petitioners do not make a colorable claim that the Court of Appeals' decision is in such direct conflict with this Court's decision in Coopers & Lybrand as to merit review of the former pursuant to Supreme Court Rule 10.1.(c). All the petition contains is a passing reference to Coopers (Pet. 7), without any reasonable explanation as to exactly how it was that the Court of Appeals failed to heed this precedent. This fatal flaw in the petition is not surprising, because Coopers & Lybrand mandates the result reached by the Court of Appeals herein.

The insignificance of the first question presented for review is underscored by the First Circuit's decision not to publish its January 5, 1990 refusals to immediately entertain

interlocutory review. Pursuant to First Circuit Local Rules 36.1. and 36.2.(b)6., an unpublished opinion is "directed to the parties... and may not be cited in unrelated cases"; "may be cited only in related cases"; i.e., has no precedential value.

This isolated dispute over an arcane point of federal appellate jurisdiction hardly constitutes a matter of national importance which merits plenary review by this Court.

C. Petitioners' second "reason for granting the writ" is nothing more than an argument that the Court of Appeals somehow "erred" in refusing them a writ of prohibition (or now, "supervisory mandamus"). Pet. 13-17. This is insufficient to obtain review herein. Supreme Court Rule 10.1. Other than merely parsing the case law, Pet. 13-15, there is no showing as to how the Court of Appeals departed from the demanding standards established by this Court for the issuance of such extraordinary writs. Ex Parte Fahey, 332 U.S. 258, 91 L.Ed. 2041 (1947); Mallard v. United States District Court for the Southern District of Iowa, 490 U.S. ___, 104 L.Ed.2d 318 (1989).

Petitioners' argument seems to be that the District Court somehow violated the XI Amendment by compensating for delay using compound interest calculations; and that this "error" by the District Court was of such extraordinary constitutional/ jurisdictional magnitude, that it compelled the Court of Appeals' intervention by writ of prohibition. Pet. 15-17.

Petitioners' argument borders on the frivolous. They had to demonstrate a "clear abuse of discretion," "conduct amounting

to usurpation of the judicial power," the absence of adequate alternative means for relief,[12] and that their right to issuance of the writ was "clear and indisputable." Mallard, 104 L.Ed.2d at 331.

In this case, petitioners faced two formidable barriers to any such showing of extraordinary circumstances, which showing the Court of Appeals understandably found was absent. Pet. Ap. 3a. First, there was controlling precedent from this Court to the effect that an enhancement to an attorneys' fee award to compensate for delay in payment does not violate the XI Amendment. Missouri v. Jenkins, 491 U.S. ___, 105 L.Ed.2d 229 (1989). Secondly, there was likewise controlling precedent from this Court, iterated in Jenkins, to the effect that compensation for delay may be computed "either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value." Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711 at 716, 97 L.Ed.2d 585 at 592 (1987) (emphasized); cited in Jenkins, 105 L.Ed.2d 229 at 239. Thus, it was clear under Jenkins that the XI Amendment presented no bar whatsoever to compensation for delay "either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value." Likewise, Library of Congress v. Shaw, 478 U.S. 310, 92 L.Ed.2d

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12. The Court of Appeals found that petitioners did "not even raise this issue [that irreparable injury would occur if immediate review were withheld] in their opposition to the motion to dismiss the appeal." Pet. Ap. 2a.

250 (1986), presented no such XI Amendment bar, petitioners' protestations to the contrary[13] notwithstanding. Jenkins, 105 L.Ed.2d 229 at 238-240.

Reduced to its essentials, then, petitioners' plaint is that the District Court somehow "erred" in selecting the "or" alternative, instead of the "either" alternative, both permitted by Jenkins: it adjusted the original fee based on historical rates to reflect its present value,[14] instead of awarding current rates.[15] The Court of Appeals then somehow "erred" when it heeded this Court's demanding standards by refusing to issue a writ of prohibition (now, "supervisory mandamus") to review actions taken by the District Court which were clearly authorized by Jenkins.

Under these circumstances, the Court of Appeals can hardly be faulted for its refusal to issue a writ of prohibition. Pet. Ap. 3a. Petitioners have not shown that there was a "clear abuse of discretion" or "conduct amounting to usurpation of the judicial power"; much less that they were "clearly and indis-

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13. Pet. 16.

14. By definition, "present value" calculations are based on compound, not simple interest. American Jurisprudence Proof of Facts, "Damages," Proof 22, pp. 652-654 (1959). In eminent domain, where the delay in payment exceeds a year, the federal government allows for compound interest as just compensation. 40 U.S.C.A. 258.e-1(2). See also 28 U.S.C. 1961(b) (interest on money judgments entered in civil cases in federal courts to be compounded annually).

15. It did award current (1988) rates, without any interest, for current (1987-1989) work. Pet. Ap. 8a.

putably " entitled to a writ of prohibition. These are hardly compelling reasons that meet the reviewability standards found in Supreme Court Rule 10.1.

As with the first "reason for granting the writ," petitioners' construction of an alleged "conflict" between the First and Ninth Circuits, the latter exemplified in Rosenfeld v. U.S., 859 F.2d 717 (9th Cir. 1988), Pet. 15, is contrived. The Rosenfeld court did not have a controlling precedent, like Jenkins, to guide it in its examination of the sovereign immunity defense raised by the United States, which the Rosenfeld court considered to "implicate the district court's scope of jurisdiction." 859 F.2d at 723. Thus, it exercised mandamus jurisdiction to review the defense, but eventually found no such valid defense and denied the writ. Id. at 727.

Here the First Circuit did exactly the same thing: deny the writ. Pet. Ap. 3a. It had no need to entertain, much less to settle, an alleged XI Amendment issue which this Court had already settled in Jenkins.

Petitioners' construction of an alleged "conflict" between the First Circuit in this case and the Ninth Circuit in Rosenfeld is based on a flawed premise: that XI Amendment immunity for state governments is coextensive with the "no-interest" bar which shields the federal government. This premise was expressly rejected in Jenkins precisely in the area of concern herein: attorneys' fees. Jenkins, 105 L.Ed.2d 229 at 238, n. 3.

D. In the final analysis, what petitioners seek is a ruling by this Court that interim fee awards (and their enhancement) qualify for the exceptional Cohen treatment and are therefore immediately appealable.

The final result sought by petitioners defies long-standing policy against piecemeal, interlocutory appeals. This firm policy is clearly set forth in a statute, 28 U.S.C. 1291: only final decisions are immediately appealable. The "policies militating against interlocutory appeals"[16] have long been recognized by this Court.

Furthermore, although the matter in controversy in this particular case consists of interim attorney's fees, what petitioners really advocate is a quite extraordinary relaxation of the Cohen requirements for all "cases of protracted institutional reform litigation where final judgment is not foreseeable." Pet. 6. Thus, it is petitioners who seek to "reformulate the collateral order doctrine," by making every interlocutory order, no matter how insignificant, immediately appealable in every "case of protracted institutional reform litigation where final judgment is not foreseeable." Taken to its final consequence, petitioners' theory would render immediately appealable, in such cases, even routine interlocutory orders entered as to the most picayune matters, e.g., orders granting or denying extensions of time.

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16. Scalia, J., concurring in Lauro Lines v. Chasser, 490 U.S. ___, 104 L.Ed. 2d 548 (1989).

In the appendix to a petition for certiorari in a prior phase of this litigation (petition no. 89-1016, pp. 63a-64a), petitioners referred to so-called protracted institutional reform litigation, pending in all but a handful of states, in the District of Columbia and in the U.S. Virgin Islands. Presumably, this should cover all of the federal courts of appeals, which sit over the federal trial courts where all of these cases are pending. Taking petitioners' theory to its logical consequence, all of the federal courts of appeals would now have to entertain appeals and exercise mandamus jurisdiction to review any and all interlocutory orders entered in each of these cases, no matter how inane, just because they were entered in cases belonging to that newly created and privileged classification, "protracted institutional reform litigation."

It must be noted that this artificial classification is sheer bootstrap, of petitioners' own making. For many years, petitioners have subjected respondents to cruel and unusual punishment. Feliciano v. Barceló, 497 F. Supp. 14, 16 (D.P.R. 1980). This had been going on well before the commencement of this case and continues to this day. Morales Feliciano v. Romero Barceló, 672 F. Supp. 591, 594 (D.P.R. 1986). To protract matters, petitioners have fought respondents "every step of the way frequently beyond the limits of responsible litigation... insisted on an adversary [posture] of extreme vexatiousness which has surely tested the patience of the [trial] Court and wasted judicial resources... litigate[d]

protractedly factual matters which petitioners know[s] to be true beyond any reasonable doubt... throughout the course of these proceedings." Id. at 595.

Petitioners have further protracted matters by agreeing to a stipulation to remedy overcrowding and then making an about-face and moving for relief from their own stipulation and from the order approving it. Morales Feliciano v. Hernández Colón, 672 F. Supp. 627 (D.P.R. 1987). Such tactics have been aptly described as "brinksmanship." Id. at 636.

Petitioners have protracted matters even further by their continued contempt for the orders of the trial court, which defiance has resulted in the imposition of civil fines. Morales Feliciano v. Hernández Colón, 697 F. Supp. 26, 36 (D.P.R. 1987). Petitioners have protracted matters still further by unsuccessfully pursuing the issue of fines all the way up to this Court. Morales Feliciano v. Parole Bd. of Com. of P.R., 887 F.2d 1 (1st Cir. 1989), cert. den. 108 L.Ed. 2d 646 (1990).

While the litigation has spanned over a decade, Morales Feliciano v. Hernández Colón, 697 F. Supp. 37, 38 (D.P.R. 1988), petitioners have protracted matters even further by their having "established a pattern of gratuitous, time-wasting contentiousness by [petitioners], who litigate in vain and obstruct the discovery of the truth of facts which are, and should be, beyond dispute.... The [trial] Court's attempts to mediate have been rebuffed and the [petitioners] have a poor record of cooperation

in disposing of the many problems generated even by stipulated decrees." Id. at 48.

In the meantime, respondents get beaten for talking to class counsel, Morales Feliciano v. Hernández Colón, 704 F. Supp. 16 (D.P.R. 1988); and one jail has been ordered closed. Morales Feliciano v. Hernández Colón, 697 F. Supp. 37, 51 (D.P.R. 1988).

In the specific area of attorneys' fees, petitioners have egregiously protracted matters by their litigation tactics:

> A brief summary of the fees' proceeding must be told. On prior occasions we have noted the contentiousness and the excessive adversariness with which defendants have met the claims made by the plaintiff class.... This incident is no exception to the stonewalling, dilatory tactics used by the defendants. They have made every attempt to make sure that "[t]his fee litigation [would result] in what the Court in Hensley warned against; "a second major litigation."...
>
> Not unexpectedly, the showing made by defendants at the hearing was weak. Broad-gauged attacks on duplication of work or challenges to the claims made by plaintiffs' attorneys followed the same pattern of litigation that has characterized this case. The fact that an immense amount of work had been performed for the plaintiff by first-rate lawyers could not be contested. We had anticipated attacks on particularized claims to match the requests for information and for time to prepare for this hearing. The defendants never went beyond vagueness and protestation....
>
> Finally, we believe that the claimed hours are more than reasonable in light of defendants' contentiousness and lack of compliance with this Court's orders. It must be stressed that the prison conditions were declared unconstitutional more than eight years ago. Plaintiffs' attorneys are still litigating this case because of defendants' irresponsibility. And, as we have held before,... defendants' conduct throughout the whole litigation has been, to put it

> mildly, obstreperous. They have opposed, sometimes viciously, every discovery attempt or motion by plaintiffs.[5] "The government cannot litigate tenaciously [in this case, excessively] and then be heard to complain about the time necessarily spent by plaintiffs in response."...
>
> 5. The latest example was the Secretary of Justice's complete disobeyance of this Court's July 13, 1986, order to produce documents in relation to the attorneys' fees issue. We could have held him in contempt but reluctantly refrained from doing so because that would have further delayed the attorney's fees award.

Morales Feliciano v. Hernández Colón, 697 F. Supp. 51, 55-56, 57 (D.P.R. 1988).

If the litigation has been "protracted," then it is only due to petitioners' failure to abide by the Bill of Rights and by their reprehensible litigation tactics, which tactics have caused all sorts of delay; in short, due to petitioners' inexcusable conduct. This has transmogrified the case into "protracted institutional reform litigation" and, according to petitioners, now entitles them to the immediate attention of the Court of Appeals on any and every interlocutory matter which may arise in the case.

This petition for certiorari is but another example of petitioners' tactical maneuvers to further protract this case.[17] While petitioners enjoyed the representation of retained counsel over the years, which counsel get paid on a regular basis, the payment of fees to respondents' counsel was delayed, in the hope

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17. It is petitioners who have defied this Court's admonitions. Hensley v. Eckerhart, 461 U.S. 424 at 437, 76 L.Ed. 2d 40 at 53 (1983).

that sheer economic power would eventually obstruct any vindication of the constitutional rights of the prevailing parties, the respondent class.

Respondents submit that this case is not an extraordinary case where still another Cohen exception can or should be excised; thus, it is not worthy of review by this Court. Stated otherwise, it is not necessary to grant review herein for the sole purpose of adhering to a policy and then to affirm.

E. Once again, the final result sought by petitioners is to obtain the immediate reviewability of each interim fee award (and any enhancement thereof) in an ongoing civil rights case such as this one.

In this particular case, there have been two interim fee awards and an enhancement of the first one. There should be other interim fee awards in the future. As petitioners would have it, each interim fee award would be immediately followed by a separate round of appeals, eventually culminating in this Court. Predictably, this case should then come before the Court of Appeals and this Court, periodically, on the sole issue of the propriety vel non of each interim fee award, until final compliance be achieved, if ever. At least one separate slot in this Court's docket should then be "reserved" for review of interim fee awards made in this case, from time to time.

The result would be not just one, but a whole series of "secondary fee litigation(s)," until final judgment. This Court has stated that a request for attorney's fees should not turn

into extensive, protracted satellite litigation. Hensley v. Eckerhart, 461 U.S. 424 at 437, 76 L.Ed. 2d 40 at 53 (1983).

This case is an example of such an undesirable series of "secondary fee litigations." The 1988 and 1989 interim fee awards and the 1989 enhancement have now been the object of no less than two separate rounds of appeals, totalling four appeals to the Court of Appeals,[18] a petition for writ of prohibition, and now this petition for certiorari. Assuming, as we must, other interim fee awards, given petitioners' pugnaciousness,[19] there would be further appeals to the Court of Appeals, further petitions for writs of prohibition and further petitions for certiorari to this Court. The rounds of "secondary fee litigations" would grow exponentially, this time into the appellate levels.

This would do violence to the policy described in Hensley against protracted, satellite fee litigation. It is not necessary to grant review herein just to iterate the Hensley policy and then affirm because the result sought by petitioners violates that policy.

## IV. Conclusion

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18. Respondents admit responsibility for part of the first round of appeals.

19. As noted by the District Court, 697 F. Supp. 51 at 55-56; Pet. Ap. 30a-31a.

Petitioners having failed to present a case worthy of review by this Court, their petition for a writ of certiorari should be denied.

Respectfully submitted on July 5, 1990.

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No. 89-1904

SUPREME COURT OF THE UNITED STATES

October Term, 1989

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Rafael Hernández Colón, et al.,

Petitioners,

v.

Carlos Morales Feliciano, et al.,

Respondents.

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On Petition For A Writ of Certiorari To The
United States Court of Appeals For The First Circuit

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**APPENDIX TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

| | | |
|---|---|---|
| CARLOS MORALES FELICIANO, et al., | * | |
| Plaintiffs | * | CIVIL NO. 79-4 (PG) |
| v. | * | |
| RAFAEL HERNANDEZ COLON, et al., | * | |
| Defendants | * | |
| | * | |

**MOTION DEPOSITING MONIES**

TO THE HONORABLE COURT:

COME NOW defendants Governor Rafael Hernández Colón, Administrator of Corrections Mercedes Otero de Ramos, and the current members of the Parole Board of the Commonwealth of Puerto Rico, by their undersigned attorneys, and respectfully state:

1. Pursuant to this Court's Order of September 13, 1989, defendants hereby deposit with the Clerk of the Court check no. 00577241, issued on February 28, 1990 by the Department of the Treasury of the Commonwealth of Puerto Rico, to the Clerk of the U.S. District Court, in the amount of $2,500,859.00. Said amount represents the additional amount of

interim attorney fees plus interest awarded to the six petitioners.[1]

2. The September 13, 1989 Order amends the September 20, 1988 Order to award petitioners the following additional amounts.[2]

| | Total Award | Amount[3] Already Paid | Outstanding |
|---|---|---|---|
| Nachman | 1,412,976.24[4] | 433,748.25 | 979,227.99 |
| Pérez-Bachs | 166,647.48 | 45,805.50 | 120,841.98 |
| Anduze | 368,781.49 | 109,456.75 | 259,324.74 |
| Fdz. Seín | 966,846.23 | 296,596.95 | 670,249.28 |
| Ramos | 106,153.86 | 49,290.00 | 56,863.86 |
| | 3,021,405.30 | 934,897.45 | 2,086,507.85 |

3. The September 13, 1989 Order also awards the following amounts for services rendered between December 1, 1987 and July 31, 1989:

| | |
|---|---|
| Nachman | 96,473.00 |
| Pérez-Bachs | 57,318.30 |
| Anduze | 57,324.80 |
| Fdz. Seín | 68,390.40 |
| Ramos | 29,640.00 |
| Díaz de Carreras | 15,080.00 |
| TOTAL | 324,226.50 |

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[1]Defendants have already deposited interim attorneys fees plus interest in the amounts of $934,897.45 and $70,111.67.

[2]For services rendered up to December 1, 1987.

[3]See Motion Depositing Monies of August 15, 1989.

[4]While the face of the Order, on p.3, awards $1,413,345.31; Appendix A correctly establishes the amount to be $1,412,976.24.

4. Thus, as a result of the September 13, 1989 Order, petitioners are entitled to the following additional amounts:

| | | | |
|---|---|---|---|
| Nachman | 979,227.99 + | 96,473.00 = | 1,075,700.99 |
| Pérez-Bachs | 120,841.98 + | 57,318.30 = | 178,160.28 |
| Anduze | 259,324.74 + | 57,324.80 = | 316,649.54 |
| Fdz. Seín | 670,249.28 + | 68,390.40 = | 738,639.68 |
| Ramos | 56,863.86 + | 29,640.00 = | 86,503.86 |
| Díaz de Carreras | | 15,080.00 = | 15,080.00 |
| TOTAL | 2,086,507.85 | 324,226.50 | 2,410,734.35 |

5. In addition, post judgment interest has been calculated at the annual rate of 8.27% for the period comprised between September 13, 1989, when the Judgment was entered, and on or about February 28, 1990, when the enclosed check was prepared as follows:

| | Principal Amount | | Post Judgment Interest | | Total |
|---|---|---|---|---|---|
| Nachman | 1,075,700.99 | + | 40,225.69 | = | 1,115,926.68 |
| Pérez-Bachs | 178,160.28 | + | 6,662.21 | = | 184,822.49 |
| Anduze | 316,649.54 | + | 11,836.92 | = | 328,486.46 |
| Fdz. Seín | 738,639.68 | + | 27,613.46 | = | 766,253.14 |
| Ramos | 86,503.86 | + | 3,227.43 | = | 89,731.29 |
| Díaz de Carreras | 15,080.00 | + | 558.94 | = | 15,638.94 |
| TOTAL | 2,410,734.35 | | 90,124.65 | | 2,500,859.00 |

6. The deposit of these monies with the district court for withdrawal by petitioners pursuant to this Court Order of September 13, 1989 is not be construed as a waiver of the right of defendants and/or the Commonwealth of Puerto Rico to seek judicial review of said order at the appropriate time and, should said order be vacated in full or partially, to seek the refund of monies unwarrantedly paid out. See Morales

Feliciano v. Hernández Colón, Memorandum opinions, (1st Cir., May 10, 1989 and January 5, 1990).

WHEREFORE, it is respectfully requested from this Honorable Court to take note of the above and permit the foregoing petitioners to make the corresponding withdrawals as described in paragraph 5 of this motion.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico this 6th day of March 1990.

I HEREBY CERTIFY that on this date copy of this document was mailed to Rafael Pérez-Bachs, Esq., G.P.O. Box 4225, San Juan, Puerto Rico 00936; Harry Anduze Montaño, Esq., 117 Eleanor Roosevelt Ave.. Suite 303, Hato Rey, Puerto Rico 00918; Harvey B. Nachman, Esq., P.O. Box 9949, Santurce, Puerto Rico 00908; Pedro A. Del Valle Ferrer, Esq., Puerto Rico Department of Justice, P.O. Box 192, San Juan, Puerto Rico 00902; Nora Rodríguez Matías, Esq., Condominio El Centro I, Oficina 215, Hato Rey, Puerto Rico 00918; Ivonne Díaz de Carreras, Esq., Midtown Building, Suite 206, 421 Muñoz Rivera Ave., Hato Rey, Puerto Rico 00919; Carlos Ramos González, Esq., Inter American University Law School, Box 8897, Fernández Juncos Station, Santurce, Puerto Rico 00910; José Fernández Paoli, Esq., Suite 407, Centro de Seguros Bldg., 701 Ponce de León Ave., Miramar, Santurce, Puerto Rico 00907; Vincent M. Nathan, Esq., 644 Spitzer Bldg., 520 Madison Avenue, Toledo, Ohio 43604; Louis Siegel, Esq. Office of the Court Monitor, P.O. Box 5918 Old San Juan Station, San Juan, Puerto Rico 00902;

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HON. HECTOR RIVERA CRUZ
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